Supreme Court of the United States

OCTOBER TERM, 1943

No. 180

TRANSBAY CONSTRUCTION COMPANY, *Petitioner*,

v.

CITY AND COUNTY OF SAN FRANCISCO, *Respondent*.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

We regret the necessity of a reply brief. But the respondent's brief in opposition leaves no choice. The baseless accusation of inaccuracies leveled against the petitioner cannot remain unchallenged, and the respondent's own inaccuracies require exposition and correction. Not the least of these is respondent's distortion of the nature of the petitioner's cause of action.

Although the respondent indulges in wholesale charges of inaccuracies (Br. p. 1), it cites only one specific instance, which, as will be shown, is completely supported by the record. The single claimed inaccuracy is referred to as follows (Br. p. 7):

> "For instance, it is untrue, as stated in the petition, that 'the specifications indicated that the total

> amount of rock to be excavated was 30,000 cubic yards, which would be equally divided between the north and south canyon walls,' for there was no indication in the specifications as to how the excavation would be divided between the two sides of the canyon."

It cannot be denied by respondent that the amount of excavation was estimated in the specifications at 30,000 yards (R. 297). True, there is no direct statement in the specifications that excavation would be divided equally between the north and south canyon walls, but not only is this the only reasonable inference, as the plans showed excavation on both canyon walls, but there is testimony in the record directly supporting the statement in the petition:

> "The specifications call for 30,000 yards to be removed from the canyon walls. The plans showed that approximately half of this excavation, or 15,000 yards, would be removed from the northerly, or right bank, of the canyon wall, and about 15,000 yards from the southerly, or left bank" (R. 1183).

Thus, the "so many inaccuracies" (Br. p. 1) boil down to one example which turns out to be, not inaccurate, but completely accurate. On the other hand, the respondent's brief contains serious inaccuracies.

The most serious of these is respondent's persistent distortion of the petitioner's cause of action.[1] The purpose of the respondent's brief is to convey the erroneous impression that this is a case in which additional excavation has been required because of unsatisfactory rock conditions and that the petitioner's claim is based solely upon the delay caused by the removal of additional excavation (Br. pp. 3, 4, 6). Counsel for the respondent desire the Court to believe that the claim is

[1] It was urged upon the Circuit Court of Appeals.

based solely on delay,[2] presumably because under the specifications and the authorities recovery for delay alone is extremely doubtful (R. 305, 306). *Cf. United States* v. *Rice*, 317 U. S. 61; *Hansen* v. *Covell*, 218 Cal. 623. But although it is true that the first cause of action in the complaint was based upon delay, the theory of the second cause of action—and the one upon which the trial court allowed recovery—is that the cost of the work was so unreasonably increased by the acts of the respondent that the petitioner was in fact required to perform a contract substantially different in cost from the one agreed upon by the parties.

As part of its contention that the petitioner complained only of delay, the respondent alleges that the dam "as completed was exactly the same as that contemplated in the contract and specifications. Its nature as an arched gravity dam was not changed in any degree during the progress of the work." (Br. p. 3.) The first part of this statement is not wholly true and by itself is meaningless; the second flies in the face of the record.

The dam was not exactly the same as that in the specifications, since there was the additional excavation. Moreover, the fact that the dam may *ultimately* have been the same in no way meets the petitioner's claim

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[2] In its effort to make this point, the respondent misstates the basis of the District Court's decision. The trial judge did not allow recovery "on the ground of delay," as contended by respondent (Br. p. 4). The fact is that petitioner was given judgment by the trial court because the changes in the character and amount of the work greatly increased the cost. The court said:

> "Circumstances unanticipated by the parties made radical changes in the character and amount of the work to be performed under the contract, greatly increasing the expense thereof" (R. 81).

that the respondent's acts unreasonably and unnecessarily increased the cost of performing the work. The most direct cause of this increase was the fact that, after the petitioner had commenced work, there was a complete lack of agreement between the State and City engineers as to what extent the dam when finally completed should function as an arch or a gravity dam. This, of course, was a risk the petitioner had not anticipated and could not be expected to assume. The testimony is uncontradicted that, ten months after work had commenced, no decision had been reached between the State and City engineers as to whether the dam when completed was to function primarily as an arch dam or a gravity dam (R. 387). If the dam had been made to function as a gravity dam, it could have been made safe with much less excavation than was actually removed (R. 387).

Furthermore, because State and City engineers could not for some time reach a final decision as to the extent to which the dam should act as an arch or as a gravity dam, constant changes were made during the progress of the work in the nature and type of the excavation, the elimination of fillets, and the manner in which the grouting was to be performed, all of which directly affected the extent to which the dam when completed would function as an arch or a gravity dam (R. 371, 745, 2390-2392, 2530). The evidence showed that there was a period when the petitioner was building "something different" from the design in the specifications (R. 422) and that only "eventually" was the dam built to that design (R. 531). There was some testimony to the effect that there were no basic changes in design during the progress of the work (R. 1556), but it was by a City engineer who, on cross-examination, admitted that the he was employed in the office in San Francisco

during the progress of the work and was only occasionally at the site of the job. Hence the statement that the nature of the dam as an arched gravity dam was not changed in any degree during the progress of the work is contrary to the record.

We pass now to another statement by respondent (Br. p. 3) to the effect that the petitioner's testimony showed that the mere fact of increase in the amount of necessary excavation over the estimate did not result in any undue burden. This statement is misleading. The record discloses that the witness stated that if the petitioner had been informed originally that 84,000 yards of excavation would be required rather than 30,000 yards, additional equipment could have been provided for removing the additional excavation without any delay, but that the manner in which the contractor was required to perform the excavation greatly increased the cost of the entire job.[3]

The respondent dwells at some length upon the provisions of Sections 1688 and 1691 of the Civil Code of the State of California which provide the manner in which a contract may be rescinded in that state. It is not clear why the lower court and the respondent refer to these sections, since they have no application whatsoever where the parties have so far departed from the terms and provisions of the original contract that their consent to the abrogation or rescission of the original contract must be implied. This, in our opinion, is the effect of the cases cited in the petition for a writ of certiorari.

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[3] The witness stated that the difficulty was in "going back over and over the same ground, taking off a little and going back and taking off a little bit more, and just doing that constantly, repeating it constantly * * *" and in "Waiting for the job to go ahead" (R. 590).

See Petition, pp. 11-13. In each case the contractor completed the work required to be performed and recovered the reasonable value of the work, on the theory that the cost of performing the contract had been so unreasonably increased that the original contract had been abrogated or abandoned by the acts of the parties.[4]

Moreover, that is also the rule in California. If the lower court intended to hold that the consent of the parties to the rescission of a contract could not be inferred from their actions, then its decision is clearly in conflict with the decisions of the appellate courts of California. See *Tatterson* v. *Kehrlein*, 88 Cal. App. 32; *Jones* v. *Noble*, 3 Cal. App. 316; *Lohn* v. *Fletcher Company*, 38 Cal. App. (2d) 26. In the latter case the court said:

> "Abandonment of a contract is a matter of intent and is to be ascertained from the facts and circumstances surrounding the transaction out of which the abandonment is claimed to have resulted. It may be implied from the acts of the parties." (*Id.* at p. 30.)

Nor is it true, as contended by respondent (Br. p. 6) that

> "In none of the cases relied upon by petitioner was the contractor allowed, after completion of the contract, to disregard the contract measure of compensation for the work done thereunder and substitute for what had proved to be an unprofitable bargain, a more profitable recovery for work described in the contract."

In each of the cases cited in the petition, the contractor, after completing the work, was permitted to

[4] It should be noted that respondent's brief cites no cases to the contrary.

recover the reasonable value of the work performed, because the other party to the contract had unreasonably increased the cost of performing the work.

Finally, the alarming consequences feared by respondent (Br. p. 8) are wholly beside the point. Municipalities will have firm contracts if they do not impose upon contractors unreasonable methods of performance which drastically increase the cost of the work. All the petitioner prays is that the respondent bear the cost it so needlessly caused. If consequences are to be feared, they are the consequences certain to ensue if the lower court's decision stands unreversed. See Petition, pp. 13-14.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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September, 1943.